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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD BENOIT, Defendant and Appellant.	A132205 (Sonoma County Super. Ct. No. SCR573969)

Defendant, Edward Benoit, appeals from an order granting probation following a no contest plea to possession of concentrated cannabis. (Health & Saf. Code, § 11357, subd. (a).) Benoit argues that a condition of his probation requiring him to stay away from places where alcohol is the primary item of sale is unconstitutionally vague because there is no explicit requirement that he can only be punished for knowingly violating this condition. Accordingly, we modify the order to require Benoit to stay away from locations where he knows alcohol is the primary item of sale and, as modified, affirm the judgment.

I. BACKGROUND

On December 12, 2009, a police officer stopped Benoit's vehicle in a routine traffic stop. The officer observed a strong odor of marijuana emitting from the vehicle and conducted a search. In the search, the officer discovered several packages of marijuana packed in bags of cayenne pepper and coffee grounds, which are commonly used to mask the odor of marijuana and to avoid detection by drug detection canines. A total of 1334.3 grams (2.93 pounds) of marijuana were discovered. Officers received a

warrant to search Benoit's residence, in which they discovered 3.4 pounds of marijuana, 301 grams of hashish (concentrated cannabis), 0.5 grams of methamphetamine, 92.4 grams of psilocybin (mushrooms), 33 marijuana-laced food items, packaging material, pay and owe notes, a digital scale, and a cell phone.

Benoit entered a no contest plea on February 25, 2011 to one count of possession of concentrated cannabis. The trial court suspended imposition of sentence and placed him on probation for three years. The trial judge instructed Benoit that he "may not be in any place where alcohol is the primary item of sale, including bars, clubs and liquor stores." Benoit argues this condition is void for vagueness in contravention of his constitutional due process rights because it does not define whether Benoit must know he is in a place where alcohol is the primary item of sale. If the condition lacks a knowledge requirement, Benoit could violate his probation by being "unaware until he is well inside that a place is more of a nightclub than a restaurant, or more of a liquor store than a grocery store."

II. APPEALABILITY

Although Benoit did not object to the condition at trial, he may challenge the probation condition for being unconstitutionally vague or overbroad, because these claims regard " 'pure questions of law that can be resolved without regard to the sentencing record in the trial court.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 884 (*Sheena K.*).) In the interest of judicial economy, we expect that generally "the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Sheena K., supra,* at p. 889.)

III. DISCUSSION

A. The probation condition is void for vagueness without a knowledge requirement

The due process concept of "fair warning" underlies a vagueness challenge to a probation condition. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7; *Sheena K., supra,* 40 Cal.4th 875, 890.) A probation condition does not provide "fair warning"

when it is so vague that a probationer of ordinary intelligence "must necessarily guess at its meaning and differ as to its application." (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750.) To survive a challenge of constitutional vagueness, a probation condition must be " 'sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' " (*Sheena K.,* at p. 890.) Otherwise, a vague probation condition " ' "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' " (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630, citing *People ex. rel Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115–1116.)

Appellate courts have consistently held that probation conditions restricting a probationer's presence, possession, or association must include express scienter requirements to prevent the conditions from being unconstitutionally vague. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 912 (*Victor L.*) [knowingly in presence of weapons]; *People v. Freitas, supra,* 179 Cal.App.4th at pp. 751–752 [knowing possession of gun or ammunition]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 634 [knowing display of gang indicia]; cf. *Sheena K., supra,* 40 Cal.4th 875, 891–892 [in absence of express knowledge requirement, condition restricting probationer's association with persons disapproved of by her probation officer was unconstitutionally vague]; cf. *People v. Patel* (2011) 196 Cal.App.4th 956, 960 (*Patel*) [presence, possession, or association probation conditions are unconstitutionally overbroad without implied scienter requirement].)

A probation condition restricting a probationer's presence in a specified location is unconstitutionally vague unless the probationer knows where the condition prohibits the probationer from going. (See *Victor L., supra,* 182 Cal.App.4th at pp. 912–913.) In *Victor L.*, the defendant's probation condition restricting his presence near weapons was unconstitutionally vague because absent a knowledge qualification it violated the due process requirement "that the probationer be informed *in advance* whether his conduct . . . violates a condition of probation." (*Victor L.,* at p. 913.)

Here, the overwhelming body of case law requires that we hold that Benoit's probation condition as written is unconstitutionally vague. Without a knowledge requirement, Benoit may be held liable for entering a place which he later discovers to primarily sell alcohol, and due process requires that Benoit must be informed in advance whether his conduct violates his probation. The state does not have a legitimate interest in revoking probation based on an innocent misunderstanding.

B. The knowledge requirement should be explicitly stated in the probation condition

The parties agree that Benoit's condition must include a knowledge requirement but dispute whether the requirement may be implied. The People argue that we should recognize the knowledge requirement is implicit in Benoit's condition of probation, relying on the Third District Court of Appeal's recent decision *People v. Patel*. (*Patel, supra,* 196 Cal.App.4th 956). In *Patel*, a condition that prohibited the probationer from drinking or possessing alcohol and being in any place where it is the chief item of sale was held unconstitutionally overbroad. (*Patel, supra,* at pp. 959–960.) Although the court chose to modify the condition by inserting a knowledge requirement and affirmed the condition as modified, the Third District gave notice of its intent to no longer direct modification of this condition in appeals where a knowledge requirement is not explicit. (*Patel, supra,* at p. 960.) In the interests of "fiscal and judicial economy," the Third District now construes "every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly." (*Patel, supra,* at p. 960.) Thus, "it will no longer be necessary to seek a modification of a probation order that fails to expressly include a scienter requirement." (*Patel, supra,* at pp. 960–961.)

The rule expressed by the Third District in *Patel* appears to be unique.[1] Other appellate courts continue to consistently hold that probation conditions restricting a probationer's presence, possession, and association must include scienter requirements, and have elected not to follow *Patel.* Instead they continue to modify probation orders on

[1] See also *People v. Ebersold* (Nov. 16, 2011; C065916) [nonpub. opn.]; *People v. Almeda* (Sept. 13, 2011, C062017) [nonpub. opn.].

a case-by-case basis. In *People v. Moses*, The Fourth District Court of Appeal modified a sex offender's presence, possession, and association probation restrictions to include knowledge requirements. (*People v. Moses* (2011) 199 Cal.App.4th 374, 377–379.) The court noted its frustration with the unfortunate routine of appeals seeking to modify such conditions of probation but held that, unlike the court in *Patel*, "we instead choose to modify and strike certain challenged probation conditions in this case and by this opinion state that the superior court should revise its standard probation conditions form to meet constitutional requirements." (*Moses, supra*, at p. 381.) Other Courts of Appeal have similarly declined to follow *Patel* in nonpublished decisions.[2]

We too see scarce resources expended on this undisputed issue far too frequently. Constitutionally sound conditions of probation impart fair warning of prohibited conduct. For example, a condition that prohibits the probationer from being in any place where alcohol is the primary item of sale, including bars, clubs, and liquor stores, imparts fair warning in a practical sense. Adding an explicit knowledge requirement does not make such a warning more effective. The knowledge requirement in cases like this bears more upon whether the probationer can be punished for being in a prohibited place, than it does on whether the condition imparts constitutionally sufficient notice.

While we recognize the wisdom of the *Patel* approach (forestalling future claims by holding that the scienter requirement is implied), we will not follow it because the First District, unlike the Third, has separate divisions, and we will not presume to speak

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[2] The Sixth District prefers explicit knowledge requirements for presence, possession, and association prohibitions because of a concern that implying knowledge in all presence, possession, and association cases could undermine the justification for explicitly stating the requirement when constitutional rights are at stake, as in *Sheena K.* (See *In re Gerardo M.* (Apr. 6, 2012, H036279); see also *People v. Bito* (Apr. 5, 2012, H036375) [including explicit knowledge requirement in prohibition from drinking alcohol as well as similar modifications to other presence, probation, and association conditions], *People v. Ulloa* (May 15, 2012, H037192).) The First District has followed *Moses* and expressed reluctance to decide on behalf of the other "discrete, differentiated divisions" of the District. (*People v. Barnes* (Apr. 17, 2012, A131369); see also *In re Richard D.* (Dec. 27, 2011, A131621): "we think the better approach is to modify certain challenged probation decisions in this case.")

for our colleagues in the other divisions of this Court. In the event that trial courts do not revise their standard probation conditions to make the knowledge requirement explicit, we encourage our Supreme Court to take the opportunity to settle this area of the law in the appropriate case. (Cal. Rules of Court, rule 8.500(b)(1).)

IV. DISPOSITION

The probation condition should be modified to read "You may not be any place where you know alcohol is the primary item of sale, including bars, clubs, and liquor stores." As modified, the order is affirmed.

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Siggins, J.

We concur:

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Pollak, P.J.

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Jenkins, J.